COUNTERSTATEMENT OF QUESTIONS PRESENTED

(1) Whether charging parties before the National Labor Relations Board possess the status of "parties" in district court proceedings initiated by the filing by a Regional Director of a petition for an injunction under Section 10 (l) of the National Labor Relations Act.

(2) Whether such charging parties have a right to intervene as a matter of right in such proceedings.

STATUTES INVOLVED

Petitioners have adequately set forth the Statutes Involved in the Petition for Certiorari.

COUNTERSTATEMENT OF THE CASE

Because a very large proportion of the matters contained in the Statement of the Case contained in the Petition is argumentative or irrelevant to the issues here involved, this Respondent makes this Counterstatement of the Case:

Between June 10 and June 23, 1970, Petitioners filed unfair labor practice charges (and amended charges) against Respondent Miscellaneous Drivers and Helpers Union Local No. 610 (hereafter called "Local 610"), alleging that that union had violated Section 8 (b)(4)(B) of the National Labor Relations Act (Pet.Ap. 9-14).[1]

In connection with those charges, Respondent Joseph H. Solien, Regional Director, 14th Region of the Board, on June 29, 1970, filed a petition for injunction under

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[1] "Pet.Ap." references herein are to the Appendix contained in the Petition for Writ of Certiorari. "A" references are to the printed Appendix filed with the Court of Appeals below and the "SA" references are to the printed Supplemental Appendix filed in said Court of Appeals, both of which we assume Petitioners have filed with this Court pursuant to its Rules.

Section 10 (l) of the Act against Local 610, seeking a temporary injunction against certain picketing alleged in said petition to be violative of the Act (Pet.Ap. 1-15). As stated in that petition, at all times material thereto Local 610 had had a dispute with Be-Rite Delivery Service, Inc. (hereafter called "Be-Rite") concerning wages, hours, terms and conditions of Be-Rite's employees (Pet. Ap. 5), and in connection with that dispute said employees struck Be-Rite on June 9, 1970. However, when the 10 (l) petition was filed that dispute had already been settled, and the strike had ended (Pet.Ap. 46). There has been no picketing or strike activity of any kind from and after June 28, 1970, the day before the 10 (l) petition was filed (S.A. 9).

Nevertheless, on July 1, Terminal Freight Cooperative Association and Terminal Freight Handling Co. (hereafter jointly referred to as "Terminal") filed with the U. S. District Court for the Eastern District of Missouri a motion to appear in said 10 (l) proceedings as a full party litigant, and on July 2, Sears, Roebuck and Co. (hereafter called "Sears") filed a motion that that Court accept its entry of appearance or, in the alternative, to intervene (Pet.Ap. 18-22). On July 6, Local 610 entered its appearance in said cause, and filed a brief in opposition to said motions of Sears and Terminal (A. v-vi).

On July 7, a hearing was held before the District Court, at which all parties were afforded a full opportunity to present their respective positions with respect to said motions of Sears and Terminal. At the same time, all parties were afforded a full opportunity to present their respective positions with respect to a Stipulation that had been entered into between the Regional Director and Local 610, subject to the approval of the Court, to dispose of said 10 (l) litigation (S.A. 1-15). In addition, on the same day Sears and Terminal each filed written objections to the proposed Settlement (A. 57-63). At

that hearing, it was conceded that all picketing had ceased (S.A. 15).

The following day, July 8, the District Court entered his order denying the motions of Sears and Terminal to intervene as full parties in said litigation, but permitting them to appear at all hearings, introduce evidence and file Briefs. In that same order, the District Court disapproved the proposed Stipulation (A. 50-3), which had been signed by the Regional Director and Local 610 (Pet. Ap. 33-34). No further hearings were held by the District Court, but after the Regional Director and Local 610 had made some changes in the original Stipulation language to meet most of the objections which had been raised by Sears and Terminal, the District Court entered an order approving the revised Stipulation as presented to him, copies of both the Order and the Stipulation as revised being mailed to attorneys for Sears and Terminal (Pet.Ap. 33-38; A. vi, vii). The approved Stipulation generally provided that Local 610 agreed not to engage in certain picketing for purposes proscribed by the Act; that if the Regional Director should later file an affidavit that he found probable cause to believe that Local 610 had breached said Stipulation, the District Court may forthwith[2] issue a temporary injunction in the form attached to the Stipulation.

Thereafter, Petitioners here perfected their appeal to the Court of Appeals for the Eighth Circuit. On March 12, 1971, that Court affirmed the judgment of the District Court denying appellants full party status and the right to intervene (Pet.Ap. 43-58).

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[2] The Stipulation which the District Court rejected had provided for a 24-hour notice before the temporary injunction could be issued (A. 52). In addition, paragraph 5 of the rejected Stipulation, to which Sears and Terminal had objected at the July 7th hearing (S.A. 3-5) was stricken from the Stipulation as approved by the District Court.

ARGUMENT

A. Section 10 (l) Clearly Limits the Rights of a Charging Party to the Right to "Appear by Counsel and Present Any Relevant Testimony".

Petitioners contend that the legislative history of the Taft-Hartley amendments to the National Labor Relations Act show a Congressional "intent" to permit charging parties to have full party status in 10 (l) injunctive proceedings. However, they choose to ignore the fact, as set out in the opinion of the Court of Appeals for the Eighth Circuit below (Pet.Ap. 49), that in enacting Section 10 (l)[3] Congress drew a clear distinction between the status to be afforded a labor organization against whom injunctive relief is sought by the Regional Director, and that of the charging party in the underlying unfair labor practice case. As to the labor organization in such a case, the Eighth Circuit points out that Section 10(l) provides that the service of legal process upon certain officers and agents thereof "shall constitute service upon the labor organization and make such organization a **party to the suit**" (emphasis supplied). As to "any person involved in the charge", including the "charging party", Section 10 (l) limits their participation to receiving from the Court notice of "filing of any such petition" and to be "given an opportunity to appear by counsel and present any relevant testimony" (Pet.Ap. 49).

There is a sound reason why Congress did not afford party status to Charging Parties in 10 (l) litigation. The 10 (l) provisions are an exception to the Norris-LaGuardia prohibition against injunctions in labor disputes, as 10 (h)[4] of the Act sets out. Having made such an ex-

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[3] Reprinted in pertinent part as an Addendum to this Brief.

[4] Reprinted in pertinent part as an addendum to this Brief.

ception, Congress was careful to provide that such injunctions could only be applied for by a Regional Director or Regional Attorney. Congress was aware of the excesses which had been committed by Federal Courts in granting injunctions in labor disputes on petition of employers, which ultimately led to the enactment of the Norris-LaGuardia Act. In **Sears Roebuck & Co. v. Carpet, Linoleum, Soft Tile and Resilient Floor Covering Layers, Local Union No. 419 et al.**, 410 F. 2d 1148, 1150 (10th Cir., 1969), that Court, after pointing out that in enacting the Norris-LaGuardia Act Congress was "intent upon taking the Federal Courts out of the labor injunction business", stated:

> "Accordingly, when an exception to that Act, such as is here involved, is relied upon to support the jurisdiction of the Court, the language employed to articulate that exception will not be given any more expansive an interpretation than is clearly warranted. Viewed in that context, the limited rights conferred upon a Charging Party in a 10 (l) proceeding, the right to 'appear by counsel and present any relevant testimony,' must be taken to mean just that, no more and no less."

Petitioners' argument that legislative history establishes that Congress intended that a charging party be given full party status seems to be that since Congress had considered giving private parties the right to seek injunctive relief, though such provisions were stricken from the legislation as finally passed, that indicates an intent of Congress to give a charging party full party status. The logic of such an argument escapes this Respondent.

The Eighth Circuit has correctly advised Petitioners that their reasons for contending that charging parties should be given full party status "should be addressed to Congress, the policy making branch of the government" (Pet.Ap. 52).

B. **The Limited Role Which Congress Has Assigned Charging Parties in 10 (l) Litigation Precludes Not Only Their Being Assigned "Full Party" Status But Also Denies Them the Right to Intervene.**

As an alternative to their argument that they are entitled to "full party" status, petitioners contend they at least have the right to intervene in 10 (l) proceedings. The thrust of their initial argument on that issue seems to be that this Court in **Association of Data Processing Service Organizations, Inc. v. Camp**, 397 U.S. 150 (1970) and **Barlow v. Collins**, 397 U.S. 159 (1970) announced certain criteria which one must meet in order to establish that he is sufficiently aggrieved by an administrative order to be entitled to judicial review under the Administrative Procedure Act, 5 U.S.C., Sec. 701 et seq., of an adverse agency action—and that petitioners here have met that test. As the Eighth Circuit pointed out in its opinion, we are here concerned with the issue of whether charging parties have the right to obtain appellate review from a **judicial** order in 10 (l) proceedings and not the right of judicial review of **administrative** action. Moreover, neither **Data Processing** nor **Barlow** involved the National Labor Relations Act. **Data Processing** dealt with the Bank Service Corporation Act and the National Bank Act, while **Barlow** was concerned with an interpretation of the Food & Agriculture Act. This Court, in **UAW Local 238 v. Scofield**, 382 U.S. 205, 210 (1965), in holding that a charging party did have the right to intervene in a Court of Appeals' review of National Labor Board final orders, stated:

> "Of course, in considering the propriety of intervention in the courts of appeal, our discussion is limited to Labor Board review proceedings. Federal agencies are not fungibles for intervention purposes—Congress has treated the matter with attention to the particular statutory scheme and agency."

It is **Scofield** upon which petitioners chiefly rely to support their claim to the right to intervene in 10 (l) proceedings. **Scofield,** of course, dealt with appellate court review of final NLRB administrative orders as provided for in Section 10 (f) of the Act and intervention was permitted charging parties principally to avoid "unnecessary duplication of proceedings" (382 U.S. at 212). It is to be noted that while affording charging parties the right to intervene in such appellate review proceedings of final Board orders, this Court has denied charging parties the right to institute contempt action against the charged party in the Court which enforces the Board order. **Amalgamated Utility Workers v. Consolidated Edison Co.,** 309 U.S. 261 (1940).

Petitioners argue in their Petition that **Retail Clerks Union, Local 137 v. Food Employers Council, Inc.,** 351 F. 2d 525 (9th Cir. 1965) supports their right to intervene. As the Eighth Circuit points out (Pet.Ap. 55), all that **Retail Clerks** holds is that a District Court has the power to grant a 10 (l) injunction originally petitioned for by the Regional Director, notwithstanding the fact that the latter had meanwhile entered into a stipulation with the Respondent union which he felt obviated the need for that relief; that the Ninth Circuit had emphasized that its holding was concerned only with the respective roles to be played by the Regional Director and the district court, and that it was not defining "the limits of the scope of participation to be permitted the charging parties" (351 F. 2d at 529, n. 2). The Ninth Circuit itself, in denying intervention to the Charging party in **Henderson v. International Union Operating Engineers, Local 701** (420 F. 2d at 806, n. 2) distinguished **Retail Clerks** from the issue it had before it—the right of a charging party to intervene. In its opinion below, the Eighth Circuit has pointed out that "no court that has considered the question of the charging party's independent standing to seek appellate

review of an adverse 10 (l) decision has accorded the charging party this right (Pet.Ap. 56). Petitioners, on page 11 of their Petition, cite "**Solien v. International Printing Pressmen et al.**, ... F. 2d ..., 76 LRRM 1094 (CA 7, 1970)" as a case in which a charging party was afforded the right to intervene in 10 (l) proceedings. The reference "76 LRRM 1094" is to the underlying NLRB case and has nothing to do with 10 (l) litigation. Respondent Union's counsel has searched for any published report of any Seventh Circuit order involving 10 (l) litigation involving "Printing Pressmen" and has found none. In any event, it appears from Petitioners' description of such litigation, that the issue of whether a charging party has the right to intervene in 10 (l) proceedings was never actually litigated.

Petitioners, in reviewing legislative history, state that the Taft-Hartley amendments as finally adopted represented a compromise. That is correct. Local 610 contends, however, that in doing so Congress provided in the Act much more in the way of remedies to those who claim secondary activity than it has given any other person under the Act. First, in Section 303,[5] it has provided that a labor organization may be sued for damages for alleged violation of Section 8(b)(4). The Act provides no private causes of action in Federal Courts for employer unfair labor practices. Secondly, Section 10 (l) makes it mandatory for Regional Directors to seek injunctive relief for alleged violations of 8(b)(4) and for no other type of violation (except 8(e) and 8(b)(7)) even where the most flagrant employer unfair labor practices are involved.[6]

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[5] Reprinted in pertinent part as an addendum to this Brief.

[6] As a result, although four times as many complaints are filed by the National Labor Relations Board against employers than against unions, seven times as many injunctions are issued against labor unions than against employers. 36th Annual Report of National Labor Relations Board, Tables 8 and 20.

Thirdly, a complaining employer can obtain the benefits of a 10 (l) injunction, with the Government carrying the expense of such litigation, and without either the employer or the Regional Director being required to post bond as is required under Rules 62 (c) and 65 (c) of the Federal Rules of Civil Procedure in the normal injunction proceedings. Accordingly, if the Federal Court issues an injunction against certain picketing and is later found to be in error, the labor union has no relief, though the United States Supreme Court has recognized that "the issuance of a temporary injunction * * * may effectively dispose of (the union's) rights . . ." **Local 438 Laborers v. Curry**, 371 U. S. 542, 550 (1963). In spite of all of these advantages given employers under the Act in alleged secondary boycott situations, Sears and Terminal want more —the right to control 10 (l) litigation and thus to obtain directly, what they could not obtain indirectly, since it has been well established that private parties may not sue to enjoin secondary activities. **Amalgamated Ass'n of Street & Motor Coach Employees v. Dixie Motor Coach Corp.**, 170 F. 2d 902 (8th Cir. 1948).

As pointed out at the beginning of our Argument, Petitioners ignore the plain language of the statute which restricts the role which persons "involved" in the charge, including the Charging Party, may play. They attempt to make their case by "analogy". That Charging Parties have the right to participate in Board proceedings as full parties litigant, and in appellate review of those proceedings, as Petitioners argue throughout their Petition, is entirely irrelevant to the question here involved.

This case does not deal with Board proceedings or appeal from those proceedings. It deals with injunctive proceedings in Federal Court, and Petitioners' argument should be addressed to Congress, not this Court.

CONCLUSION

For the foregoing reasons, Respondent Union respectfully submits that this Petition for Certiorari should be denied.

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APPENDIX

ADDENDUM

The pertinent provisions of the National Labor Relations Act, as amended (29 U. S. C., Sec. 151 et seq.) referred to in this brief are as follows:

Sections 10 (h) and (l)—29 U. S. C., Sec. 160 (h), (j) and (l):

"Section 10—Prevention of Unfair Labor Practices:

* * *

(h) When granting appropriate relief or a restraining order * * * as provided in this section, the jurisdiction of courts sitting in equity shall not be limited by the Act entitled 'An Act to amend the Judicial Code and to define and limit the jurisdiction of courts sitting in equity, and for other purposes; approved March 23, 1932 (U. S. C., Supp. VII, title 29, secs. 101-115).

* * *

(l) Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph 4 (A), (B), or (C) of section 8 (b), or section 8 (e) or section 8 (b) (7), the preliminary investigation of such charge shall be made forthwith and given priority over all other cases except cases of like character in the office where it is filed or to which it is referred. If, after such investigation, the officer or regional attorney to whom the matter may be referred has reasonable cause to believe such charge is true and that a complaint should issue, he shall, on behalf of the Board, petition any district court of the United States * * * within any district where the unfair labor practice is questioned has occurred, is alleged to have occurred, or wherein such person resides or transacts business, for appropriate injunctive

relief pending the final adjudication of the Board with respect to such matter. Upon the filing of any such petition the district court shall have jurisdiction to grant such injunctive relief or temporary restraining order as it deems just and proper, notwithstanding any other provision of law: * * *. Upon filing of any such petition the courts shall cause notice thereof to be served upon any person involved in the charge and such person, including the charging party, shall be given an opportunity to appear by counsel and present any relevant testimony: **Provided further,** That for the purposes of this subsection district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in promoting or protecting the interests of employee members. The service of legal process upon such officer or agent shall constitute service upon the labor organization and make such organizations a party to the suit. * * *"

Section 303—29 U. S. C., Sec. 187:

"Section 303. (a) It shall be unlawful, for the purpose of this section only, in an industry or activity affecting commerce, for any labor organization to engage in any activity or conduct defined as an unfair labor practice in section 8 (b) (4) of the National Labor Relations Act, as amended.

(b) Whoever shall be injured in his business or property by reason of any violation of subsection (a) may sue therefor in any district court of the United States subject to the limitations and provisions of section 301 hereof without respect to the amount in controversy, or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit."

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1588

SEARS, ROEBUCK AND CO., ET AL., PETITIONERS

v.

JOSEPH H. SOLIEN, REGIONAL DIRECTOR OF THE FOURTEENTH REGION OF THE NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR RESPONDENT SOLIEN IN OPPOSITION

1. Petitioners filed charges with the Regional Director of the National Labor Relations Board, alleging that Miscellaneous Drivers and Helpers Union, Local 610 was engaging in a secondary boycott in violation of Section 8(b)(4)(B) (29 U.S.C. 158(b)(4)(B)) of the National Labor Relations Act (Pet. App. A9–14). Respondent Regional Director, upon determining that a complaint should issue on the charges, petitioned the United States District Court for the Eastern District of Missouri for an injunction against the Union's activity, pursuant to Section 10(*l*) (29 U.S.C. 160 (*l*)) of the Act (Pet. App. A1–8).

Before the date set for hearing on the injunction, the Regional Director and the Union entered into a stipulation providing for cessation of the Union's alleged unlawful conduct pending final determination of the charges by the Board (A. 50–56).[1] Petitioners filed objections to the stipulation on the ground that it provided inadequate protection (A. 57–63), and these objections were fully considered by the district court (S.A. 1–15). After modification to meet some of petitioners' objections, the district court approved the stipulation (Pet. App. A35–38). The stipulation provided for automatic entry of a temporary injunction upon the filing of the Regional Director's affidavit that he had probable cause to believe that the terms of the stipulation were being violated (Pet. App. A37).[2]

Shortly after the filing of the injunction petition, petitioners moved to appear as full parties litigant, or to intervene, in the Section 10(*l*) proceeding (Pet. App. A18–22). The district court denied these motions

[1] "A." refers to the appendix, and "S.A." to the supplemental appendix, filed with the briefs in the court below.

[2] Petitioners assert (Pet. 31) that the stipulation only authorizes the Regional Director to seek an *ex parte* restraining order which would expire five days from issuance. However, the stipulation provides that further hearings before the district court are waived and that, upon the filing of the aforementioned affidavit, "the court may forthwith enter a Temporary Injunction * * * in the form set forth in Exhibit (A) attached hereto" (Pet. App. A37). The form injunction set forth in Exhibit (A), which was not reprinted in the appendix to the petition, expressly states that it shall be effective "pending the final disposition of the matters involved pending before the National Labor Relations Board."

(Pet. App. A33–34). Petitioners appealed and then filed a petition for a writ of certiorari before judgment in the court of appeals, which this Court denied. *Sears, Roebuck and Co.* v. *Solien,* No. 781, this Term, certiorari denied, January 11, 1971. The court of appeals subsequently sustained the district court's ruling that the charging party is not entitled to full party status, or to intervene as of right, in a Section 10(*l*) injunction proceeding (Pet. App. A43–58). The present petition seeks review of that decision.

2. The question whether the charging party is entitled to full party status, or to intervene as of right, in a Section 10(*l*) proceeding was before the Court in *Sears Roebuck & Co.* v. *Carpet Layers,* 397 U.S. 655, dismissed on grounds of mootness. Although the issue is a recurrent one in the administration of the Act, this case is not an appropriate one for the Court to consider it.

The secondary activity on which the charges are based has ceased, and the strike against the primary employer which gave rise to that activity also has been terminated (S.A. 15, 16–17, 22). The Union has agreed with the Regional Director to enter into a formal settlement of the unfair labor practice case, and has consented to the entry of an order by both the Board and the court of appeals enjoining it from engaging in the secondary activity alleged in the complaint (A. 81–89). The settlement agreement has been approved by the General Counsel and is pending ap-